ARA Services, Inc. *and* Teamsters Local Union #515. Case 10-CA-19069

26 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 24 February 1984 Administrative Law Judge Leonard N. Cohen issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge. This matter was tried before me in McMinnville, Tennessee, on July 26 and 27, 1983.[1] On May 2 the Regional Director for Region 10 issued a complaint and notice of hearing based on unfair labor practices filed on March 11 by Teamsters Local Union #515. The complaint as issued alleges that on March 5 Respondent ARA Services, Inc., through its division manager Roy Pierce in violation of Section 8(a)(1) solicited employees to sign a decertification petition and threatened its employees with plant closure and loss of jobs if they continued to support the Union and that through these acts Respondent attempted to undermine the Union's status as its employees' exclusive bargaining representative in violation of Section 8(a)(5) and (1). At hearing the General Counsel amended the complaint to allege that, on July 13, Respondent, through its agent and supervisor Gene Jackson, further threatened employees with plant closure and loss of jobs if they continued to support the Union. Respondent filed a timely answer in which it denied the commission of any unfair labor practices.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All counsel filed briefs which have been carefully considered.

On the entire record of this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a Delaware corporation with an office and place of business located in McMinnville, Tennessee, where it is engaged in the vending and food service business. During the past calendar year Respondent purchased and received at its McMinnville, Tennessee place of business goods valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. Respondent admits and I find and conclude that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits and I find and conclude that Teamsters Local Union #515 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

For over 25 years Respondent has provided vending and food services from its McMinnville, Tennessee facility to various concerns located in rural middle Tennessee. As of mid-October 1982, Respondent had various vending accounts, including 19 full-line vending accounts, which yielded annual revenues in excess of $2.3 million.

On October 21 the approximately 38 rank-and-file employees in a Board-conducted election selected the Union to be their exclusive bargaining representative, and on October 29 the Union was certified.[2] Within 3 days of the certification, Respondent's largest and oldest customer, Gould, Inc., notified Respondent in writing of its intention to terminate their agreement in 60 days. In the next 2-1/2 weeks four more large customers gave similar notice to terminate their longstanding relationships with Respondent. The loss of those five customers accounted for annual revenues to Respondent in excess of $520,000. In no case had any the five indicated to Respondent any complaints or significant problems they may have had with Respondent's service prior to their sudden and unexpected termination of their respective contracts.[3]

Against this backdrop the parties met on December 1 for the first of five bargaining sessions. At each of these sessions Respondent was represented by George Ulrich,

[1] Unless otherwise stated all dates are in 1983.

[2] The appropriate unit is:
All warehouse employees, maintenance employees, route drivers, food production center employees, location attendants and pick-quick attendants employed by Respondent out of its McMinnville, Tennessee, facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

[3] Of the five, one, Gould, had been with Respondent for over 25 years, two for 12 years each, one for 10 years, and one for 9 months only.

Respondent's labor manager, and Roy Pierce, the division manager of middle Tennessee. The Union was represented by Union President Bobby Logan, Vice President Fred Crowder, and at least two employee committee members, Jack Myers and Cynthia Sanders.

At this initial meeting the representatives of management indicated that the climate in the McMinnville area was very antiunion and that the employees' action in selecting the Union was having an extremely adverse affect on its business. In support of this argument, the Union was shown copies of the letters of cancellation.[4] Ulrich then suggested that the union back off from the employees. Logan responded that was an unusual request and that the Union wanted a contract and had no intention of backing off.

The parties met for a second occasion on January 12. By this time one more large customer had already given official notice to terminate its contract with Respondent, with several others having verbally indicated to Pierce that they would probably be following suit shortly thereafter. The terminations or cancellations that were already in effect had caused Respondent earlier in January to lay off approximately 15 rank-and-file employees, and 2 supervisors. At this January 12 meeting Respondent's representatives stated that business was very bad and that the climate had not improved. Crowder replied that the Union did not feel that the problem was with the organizing campagn or the election. Ulrich disagreed and indicated that top management was thinking a lot about the situation and they were not sure whether they could continue in business at McMinnville. Ulrich then added that the negotiations would have a great effect on the business.

The parties met for a third time about a week later on January 21. The discussions at this meeting basically followed the pattern of what had taken place at the two previous sessions, with Respondent again indicating that it was not sure that it could stay in business in such an antiunion environment, and Crowder again responding by stating that, if they could get a contract, the Company could do its public relations work and the problems would go away.

The parties next met over a 2-day period on February 2 and 3. Again there were no significant changes in the positions of the parties and little, if any, progress was made on a collective-bargaining agreement. At the February 2 session Pierce indicated that he had thought of leaving the area but had changed his mind and was going to attempt to stay and "put things together." On the following day Ulrich told the Union that Respondent had considered selling but that nobody was interested in buying.

Between the end of the February 3 meeting and the start of the next scheduled negotiation session a month later, two more large customers, Dezurik-Southern, a 15-year customer located next door to Respondent, and Oyster Corporation, a 25-year customer located one block from Respondent's facility, terminated their contracts with Respondent effective March and April respectively. Additionally, about this same time a ninth full-line customer of some 4 years' standing also terminated its contract with Respondent. The total annual revenues of these nine customers amounted to slightly over $860,000, or approximately 37 percent of Respondent's preorganizational annual revenue. In addition to the loss of these nine full-line customers, Respondent, by the end of the first quarter of 1983, had also received notification that it could anticipate losing the accounts of several smaller customers with total revenues of $107,000. Thus, Respondent stood to lose within 6 months of the election approximately 43 percent of its total business.

In late February, Respondent received by certified mail a copy of a petition signed by approximately 33 unit employees requesting that the Union no longer represent them in dealings with Respondent. Although there was no cover letter accompanying the petition, the envelope had a McMinnville return address and had been posted locally.

Within a day or two of its receipt, Pierce received a telephone call from employee Charlotte Pearsall. Pearsall explained that she had received a telephone call from a Board agent in the Regional Office in Atlanta,[5] who explained that the employees' petition could not be processed since the election had only occurred the previous October. Pearsall then related to Pierce that the Board agent had suggested that the employees get together as a group and simply tell the Union to leave them alone. At this point Pierce indicated that he would be having a meeting with all employees later that week, and at that time she would be given an opportunity to talk directly to the employees.

The final bargaining session was held on March 2. Once against little progress was made on a contract. Ulrich repeated his earlier stated observations that business had deteriorated further and that corporate people were watching the facility closely and were not sure what to do with it at this time. Ulrich then again requested that the Union back off which it refused to do. During the meeting Pierce indicated that he was going to invite his employees to a meeting in which he intended to dispel some of the rumors that had recently surfaced.

B. *The March 5 Meeting*

On Saturday morning March 5, Pierce held a meeting at the plant with virtually all of Respondent's employees and supervisors.[6] Pierce spent the first 30 minutes or so

[4] Respondent posted on its bulletin board at the plant copies of termination letters when received.

[5] Pearsall's name was the first that appeared on the petition.

[6] A total of six individuals testified regarding this meeting. Respondent presented Pierce, Field Operations Manager Rex Davis, and Food Production Manager Dorothy Cathey, while the General Counsel presented employees Jack Myers, Cynthia Sanders, and Teresa Drake. With the one major exception noted immediately below any differences between the respective versions were not significant. The one major point of divergence was whether Pierce stated during this meeting, as attributed to him by the three witnesses called by the General Counsel, that Respondent's very survival was directly dependent on getting rid of their mutual problem—the Union. Pierce and the other two witnesses called by Respondent categorically denied that he ever specifically uttered such statements. In view of my ultimate conclusion that in other words and deeds Pierce clearly implied to the assembled employees that the lost business could

Continued

of this hour and half to hour and three-quarter meeting discussing the recent switch over to a computerized system and the proper method to fill out the various forms used for stocking, inventory control, and collections. When he finished this section, he then mentioned the various contests and specials they were going to run at some of the locations in order to generate additional sales. Pierce then reviewed the sequence of events over the past 6 months. He indicated that the petition for an election and the selection of the Union were the result of unresponsive management on his part and his supervisors' part. He observed that he felt that his credibility with the employees was not very good since they had voted for a union in October.

Pierce then reviewed with the employees the situation regarding the tremendous loss of business that followed the union election. He stated that he did not know when it would end and speculated that there might be future cancellations coming in. Pierce stated that Respondent had lost two to three times as much volume of business in a short period of time as they had lost altogether in the previous 12 years. Pierce then observed that these losses had resulted in the layoff of 17 people and with the recent termination notices he had received from Dezurik and Oyster, an additional 4 people would have to be laid off. Then Pierce mentioned that the wrath of the community had come down on him and the employees and this was unfair. He said that he could understand what the employees were going through when people would bother or ignore them on the street because the same thing was happening to him. He recited how lifelong friends would not talk to him in church and that it was exceedingly traumatic for both his people and himself. Pierce stated that he and other officials of Respondent had approached the Local Teamsters Union in an effort to get them to walk away, that corporate management had approached the International Teamsters officials and asked them to use their influence with the Local in order to get the Local to go away, and how the employees themselves had made a similar request to the Local. In making this latter point, Pierce held up an envelope. Jack Myers, an employee member of the Union's bargaining committee, asked if that was the petition the employees had signed. Pierce responded that it was and then indicated that it was only through it that he had been able to get the door reopened at Oyster. Pierce explained that he had taken the petition to Mark Inman, the official who ran the Oyster operation, and that after Inman looked at it he commented to Pierce that he already signed a new contract with F & W Vending, a competitor of Respondent. Pierce related how he told Inman that possession was nine-tenths of the law, and that since F & W was not yet physically in Oyster, he was sure that he and Inman could work something out to save the business if given a chance. Inman replied that he felt that Respondent deserved that chance. After finishing his description of this conversation with Inman, Pierce further stated that the proposal with regard to Oyster was in the mill and he would not know until the following week whether or not they would be able to keep the Oyster account. He added that while it did not look good for Respondent, perhaps they could get lucky. Pierce then reiterated that he had not been able to even submit a bid until he had taken the petition and showed it to Inman. About this same time during the meeting, Pierce indicated that the Board had contacted Charlotte Pearsall and perhaps others about the petition. Pierce stated that prior to the close of the meeting he would turn the meeting over to the employees and they would have an opportunity to find out from Pearsall exactly why the Board had told her that they could not process the petition.

Pierce then announced that he was going to next deal with the "rumor mill" or all the rumors that had been circulating around the facility. The first of the seven rumors he dealt with was the rumor that he would be leaving. Pierce said everyone thought this was going to be the case since his house was up for sale but that it was not so. He indicated that he had been visiting another division of ARA because of the substantial losses in business in McMinnville. He added that he had his own career to think of and that corporate officials had asked him to go to a Montgomery, Alabama division and see if he would be interested in transferring there. Pierce stated that on his trip to Montgomery he had inspected that division and it was an exceedingly poor one which had been losing business for several years. He stated that the support people there were very poor, that it did not have an office manager worth her salt, and that the supervisors in the field were atrocious. At this point one of the employees interrupted and asked him if the Montgomery, Alabama division was a union operation. Pierce answered that it was, that it had been nonunion up to about 5 years ago, but that it had been union since. He then told the employees that he was not going to leave, and that he had spoken to his area manager and told him that he wanted an opportunity to try and save McMinnville.

The second rumor he dealt with was the rumor that Respondent was closing. He stated that Respondent had lost a substantial amount of contracts and had not gotten any significant catering business over the recent holidays. Notwithstanding these losses he told the assembled em-

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not in all likelihood be regained unless the Union somehow went away, a resolution of this conflict may not be required. Nonetheless, to avoid any potential future confusion by any reviewing body I shall resolve it and do so now in favor of Respondent. In making this finding, I rely on several factors. First, Pierce impressed me as a totally candid individual. His testimony which was fully corroborated by Davis and Cathey was detailed, completely, entirely consistent, and had a genuine tenor of truthfulness to it. I specifically note that Pierce had prepared a detailed written outline for use during this presentation and that he followed it closely. The testimony of the Union's witnesses was not nearly so detailed nor so mutually consistent. Moreover, both Myers and to a lesser extent Sanders admitted that Pierce also stated during the meeting that Respondent was not going to close down but was going to remain in McMinnville and try to salvage the business that remained. Such statements by Pierce would be clearly inconsistent with other statements attributed to him to the effect that Respondent would and could survive *only if* the Union would go away. In deciding not to credit those portions of the General Counsel's witnesses' testimony when in conflict with Pierce, I have borne in mind what I have found to be a natural tendency of witnesses to testify as to their impressions or interpretations of what was said, rather than giving a verbatim account of what actually transpired. I am persuaded that those portions of Myers', Sanders', and Drake's testimony referred to above fall within this category.

ployees that he was going to stay there and that working together, they could save the McMinnville operation. Pierce explained that he had talked to his corporate people and had been given the opportunity to see if they could salvage McMinnville and keep it going.

He then stated that the third rumor he wished to dispel was the one that had Respondent and F & W Vending in bed together. He explained that Respondent had in the past had negotiations to buy F & W, a competitor located in Cookeville, Tennessee, but that those negotiations had failed. He stated that F & W had taken four of the nine accounts that they had lost, with Wametco taking two, and Servimation and Mid States Vending one each. Pierce acknowleged that he had heard the rumor that Respondent had been steering all the business to F & W and that as soon as the Union went away Respondent would simply buy F & W and everything would be "rosy." Pierce stated that this rumor was totally and uneqivocally false. He explained that the employees were confusing F & W with another corporation owned by the same family which on occasion built lunchroom facilities for ARA. Again he denied that F & W and Respondent were in any way engaged in a feat of legerdemain.

The fourth rumor Pierce stated he wished to dispel was that Respondent was in bed with the clients, that the "loss of business" was a sham, and that a short time after Respondent got rid of the Union all the clients would simply come back. Pierce stated that he knows the clients very well and they were absolutely not engaged in any conspiracy with Respondent.

The fifth rumor brought up was the one that Respondent was losing the accounts because of the poor quality of its service. In answering this charge he first mentioned the Dunn Steel account. Pierce noted that employees of ARA had been at Dunn Steel the day they pulled out their brand new vending machines and Wametco put in its machines. He indicated that the machines that had replaced theirs were junk. At this point he referred the audience to the particular employees in the room for confirmation. He next mentioned the E & B Carpet account which Respondent had ultimately lost to Mid States. Pierce noted that Mid States had a reputation as a very poor provider of service. He added that it was not even a real competitor of Respondent until these recent events. Pierce next mentioned the Oyster and Dezurik concerns, both of which were located within shouting distance of Respondent's facility. At this point Teresa Drake, hostess employed for a portion of the day at the Oyster facility, stated that she had been told by Mark Inman that Respondent had lost the account because of poor management and poor service. Pierce then posed a rhetorical question to the employees and asked whether they really believed that Respondent had lost those long-term accounts over poor service when they were within 2 minutes of each other 24 hours a day. Pierce explained that Inman was simply not in a position to tell the employees the true reason behind the cancellation.

The sixth rumor Pierce mentioned was that, if the Union were able to get a quick contract with Respondent, Respondent would be able to get all its business back. He indicated that this was simply not true and then mentioned the possibility of a strike. He noted that even if the contract had a no-strike clause that did not necessarily mean that the Union had to honor it. At this point Myers interrupted Pierce and the two had a brief discussion over whether or not the Union could violate a no-strike clause if such a clause existed in the contract. This brief discussion or argument was not resolved and Pierce indicated that he did not wish to interrupt the meeting further on that topic.

Pierce stated that the seventh and the final rumor going around the facility was that he was going to fire all the union employees the first chance he got. He categorically denied that this was his intention, and reminded the employees that none had suffered any retaliation at his hands in 1974 when the employees last attempted to organize his work force.

The discussion then shifted into what Pierce described as the "survival plan." Pierce stated that they could survive and that they were going to survive as a group, but to do so they would have to work together. They had to try and keep the customers that remained happy, that that was their first priority. To achieve that goal they were going to have to give better service than any other vending concerns. He again briefly mentioned the special promotions that they were going to be putting into various of their accounts. He stated that they had good people on layoff and if anyone did not produce, they would call back the people who would. Pierce further stated that Respondent was going to spend money to keep business. In this regard he noted that Respondent had been prepared to spend quite a bit of money at Oyster but had not when they lost that contract. He added, however, that they were prepared to spend this money elsewhere. Sometime during this portion of the meeting Jack Myers and/or Teresa Drake interrupted to ask whether or not Pierce was telling them that they could not survive in McMinnville with a union. Pierce stated that that was not what he was telling them, and that he did not know what their future would be with a union. He elaborated that prior to the election he had commented to employees that they should keep in mind that Respondent was basically operating in a nonunion environment in the McMinnville and surrounding areas and that comment had, unfortunately for all, proven to be correct.

Prior to closing the meeting Pierce discussed with the employees the vacation schedules and adjustments that were going to have to be made in those schedules due to the layoff of 17 employees. Finally, he indicated that he and other supervisors were then going to leave the meeting and turn it over to the employees so that they could hear directly from Charlotte Pearsall what the Labor Board had told her about their petition. At this point he and the other supervisors left the meeting and approximately 10 to 15 minutes later the meeting exclusively among the employees broke up.

C. *The Jackson-Drake Conversation*

In mid-July Pierce decided to make contingency preparations in the event that a rumored strike took place. Therefore, he requested that division headquarters tem-

porarily assign several supervisors to the McMinnville facility so that they could ride with the routemen and learn the particulars involved with servicing the various routes. Pursuant to this request he was assigned a supervisor from each of the five area divisions. On Sunday evening, July 17, Pierce and Operations Manager Davis met with four of the supervisors to discuss to which routes they would be assigned. Gene Jackson, the supervisor assigned from the Kingsport, Tennessee facility, did not arrive in McMinnville until the following morning, July 18. At that time he was assigned by Davis to ride with routeman Mason Hennesey.

Employee hostess Teresa Drake testified that, on July 19, while working at the Carrier plant cafeteria she spoke with Jackson in the presence of Hennesey. According to Drake's testimony, Jackson stated that he had spoken to Pierce and that Pierce had told him that he would shut down the McMinnville division before he would sign a union contract. Pierce further stated, according to Jackson, that he would open a commissary in Nashville and service the remaining accounts from there.

Neither Jackson nor Hennesey testified. Pierce testified that he did not even speak to Jackson until after Jackson had finished work on Monday, July 18. Pierce denied having any discussion with or in the presence of Jackson regarding the Union. The record does not, unfortunately, disclose how many days Jackson rode with Hennesey, or whether Hennesey's route took him to the Carrier plant on more than one day. Further clarification from Drake as to whether the conversation with Jackson occurred on Monday, July 18, or Tuesday, July 19, was not sought.

D. *Discussion*

1. The March 5 meeting

That portion of the complaint in which Respondent, through Pierce, at the March 5 meeting is alleged to have unlawfully solicited its employees to sign a decertification petition can be disposed of rather quickly. No evidence was offered which would even tend to show that any supervisor or management official of Respondent played a role, however limited, in the preparation and/or distribution of the employees' petition. In fact, it does not appear Pierce even knew of its very existence until he was sent a copy by certified mail on February 25, approximately 1 week prior to his meeting with all the employees. In closing argument intended to supplement his posthearing brief, the General Counsel argues that Pierce's specific reference to the invalid petition when viewed in the entire context of his remarks on March 5 constituted an indirect solicitation to the employees to renew their decertification efforts at a later time when such a petition would be processed by the Board. I find this argument which appears to be a mere afterthought to be totally uncompelling.[7] Accordingly, I recommend that this allegation be dismissed.

I next turn to the more difficult issues of whether Pierce's remarks at this March 5 meeting amounted to unlawful threats of plant closure and loss of jobs, and whether his comments regarding the employee petition and Respondent's desire that the Union walk away from its certification amounted to unlawful undermining of the Union's status as the employees' bargaining representative in violation of Section 8(a)(5).

The subjects discussed by Pierce at this meeting were many and wide ranging and essentially fall into four major headings. The final three of these which concern us here are: the sequence of events since the election, the "rumor mill," and the "survival plan." As set forth in detail above, Pierce quite thoroughly reviewed in a time sequence the events that transpired since the election. These included a summary of the community's adverse and unfair reaction to their selection of the Union. In so doing Pierce detailed what business had already been lost, and how as a consequence of such unexpected and unprecedented losses Respondent had asked the Union on both the Local and International level to withdraw. Pierce then referred to the employees' petition and at either this point or at a somewhat later point in the meeting explained that it was only because of the petition itself that Respondent had been able to even submit a bid on the lost Oyster contract.

In the next section of the meeting, Pierce discussed and clearly dispelled several rumors that had been prevalent at the plant. Among these Pierce explained that he was not leaving McMinnville, that Respondent had no present plans to close the facility, that a quick contract with the Union would not result in Respondent immediately regaining its lost business, and that Respondent had not lost several of its most important customers due to poor service.

In the final portion of the meeting, Pierce informed the employees that Respondent intended to come back into the market stronger than ever and, to achieve that, it must provide even better service to its present customers. Pierce added that Respondent was willing to spend additional money to keep and/or get customers and that a group effort was necessary. At the close of the meeting he indicated that he and the other supervisors would then leave the meeting and turn it over to Charlotte Pearsall so that he could explain to them what the Board had told her about the petition.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969), the Supreme Court held:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise efforts he believes unionization will have on his company. In such a case, however, the prediction

[7] No claim was made that management's request to the union bargaining committee that they should voluntarily walk away from its certification in any way caused the preparation of the petition. In this regard, I note that there is no evidence that at any time prior to the March 5 meeting did Pierce or any other management official inform employees other than those on the union bargaining committee that it had even made such requests. Further, I note that neither Sanders nor Myers, the only two known employee members of the committee, signed the petition and there is no evidence that they or anyone else privy to this information passed it on to employees prior to the meeting in question.

must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n 20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198, 202 (C.A. 2d Cir. 1967).

While these comments were made in a preelection context, they are no less valid where an employer's predictions concern the effects of continued unionization following certification.

In applying these standards to the instant case, I am persuaded that Pierce did not exceed the permissible limits of Section 8(c). The credible evidence establishes that rather than threatening plant closure and further loss of jobs, Pierce specifically and emphatically stated that Respondent's corporate officials had not only decided not to close the McMinnville facility, but that they were going to keep it going with an even greater financial investment. At no time did he state or otherwise indicate that he or Respondent's corporate officials believed that Respondent could not survive in McMinnville as a unionized operation. This is not, of course, to suggest that Pierce did not during this speech first link the start of Respondent's economic woes directly to the unionization of the work force, and then predict that this condition would improve dramatically if the Union would but follow the desires of Respondent and its employees and simply withdraw from the picture. Clearly, Pierce made or at least implied such. In fact, Pierce emphasized the latter point when he explained that it was only when he showed Oyster a copy of the employee petition that Respondent was even permitted to submit a bid on a contract that they had just lost.

In making these comments Pierce simply and honestly stated facts which were as obvious to him as they are to any impartial reader of the record now; Respondent's customers canceled their contracts with Respondent solely because Respondent's employees organized and these customers would not in all likelihood return to the fold unless and until the Union somehow went away. These predictions or observations were carefully phrased and were based on objective facts of demonstrably probable consequences beyond Respondent's control, rather than a threat to take certain action solely on his own initiative.[8] As Pierce's testimony amply showed, Respondent had no control over the unexpected and unfair response of its customers to its employees' exercise of their Section 7 rights. Any threat of retaliation was not one issued by Respondent. Accordingly, I recommend that the complaint allegation alleging that Pierce issued threats of economic reprisals to his employees at the March 5 meeting be dismissed.

Further, I do not find that Pierce's reference at the March 5 meeting to the employee petition while made in the context of discussing Respondent's faltering economic position constitutes an unlawful attempt to undermine and subvert the authority of the Union. Thus, I am not persuaded as urged by the General Counsel that an inference of bad-faith bargaining can be fairly drawn from this record, and I find, therefore, that the instant case is factually distinguishable from that presented in *Safeway Trails*, 233 NLRB 1078, 1082 (1977).

The record demonstrates that all the bargaining sessions between the parties occurred prior to the March 5 meeting. While little progress leading towards a collective-bargaining agreement was made during these meetings, there is neither a showing nor for that matter even an allegation that Respondent approached the bargaining table without any sincere intent to reach a final and complete agreement. Further, there is no claim or contention that the failure of the parties to meet and bargain subsequent to the March 5 meeting was a result of a refusal to do so by Respondent.

Unlike the situation in *Safeway Trails*, supra, Respondent here did not use the comments regarding the employee petition as a means of driving a wedge between the certifed representative and the employees. That chasm between the Union and the employees had existed since the last week in February, when over 75 percent of the employees in the appropriate unit had signed the petition. That Respondent welcomed this development and indicated as much to its employees is simply not sufficient evidence on which to base a finding that Respondent violated its statutory obligation to bargain in good faith. Accordingly, I recommend that the 8(a)(5) allegations contained in the complaint be dismissed.

E. *The Jackson-Drake Conversation*

Despite entertaining certain misgivings concerning the reliability of Drake's account of her conversation with Jackson, I will for the purposes of this decision treat her testimony as credible. This does not mean, however, that I find that in making these remarks Jackson was in any fashion accurately repeating plans or sentiments expressed to him by Pierce. As noted earlier, I found Pierce to be a most impressive witness and I, therefore, credit his denials in this regard. Even if it were shown that Pierce had had an opportunity to meet with Jackson prior to the latter's accompanying Hennesey to the Carrier plant, I find it highly improbable that a man of

[8] *Continental Kitchen Corp.*, 246 NLRB 611, 615 (1979).

Pierce's obvious intelligence would, without any regard to the possible adverse consequences, utter such remarks to a total stranger a scant 2 weeks prior to the opening of an unfair labor practice trial in which he was personally charged with violating Section 8(a)(5) and (1) of the Act. Further, I note that there was no showing that the parties had engaged in any negotiations during the 4-1/2 months preceding these alleged remarks. In these circumstances, Pierce would simply have no reason to discuss Respondent's bargaining strategy with Jackson.

The complaint as amended at hearing alleges that Jackson was a supervisor and an agent of Respondent and as such his coercive statements to Drake are attributable to Respondent. The answer denies that Jackson occupied any such supervisory or agency status and Respondent thus argues that it is not legally responsible for any alleged misconduct on Jackson's part. I am persuaded that Respondent has the better of these arguments.

No evidence whatsoever was offered as to what duties or responsibilities Jackson exercised or possessed at his home facility in Kingsport, Tennessee. While Pierce readily conceded that he specifically asked for "supervisors" to be sent to McMinnville to learn the routes and that he "assumed" that those sent, including Jackson, were "supervisors" at their own facilities, it is clear that the designation or title placed on an individual by his employer is not determinative of his status under the Act.[9] "The decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise by [him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act." *NLRB v. Brown & Sharp Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948). Here, there is a total failure by the General Counsel to meet his burden in proving that Jackson met this standard.

Likewise, I conclude that Jackson while serving at the McMinnville facility was neither clothed with actual authority nor the apparent authority to speak to employees on behalf of Respondent concerning labor relations matters. Jackson's sole purpose in reporting to the McMinnville facility was to acquaint himself with routes in the event that the employees struck Respondent. His duties while thus engaged did not extend to the exercise of any of the indicia of supervisory authority set forth in Section 2(11). Moreover, there is no showing that Respondent in any way gave Drake or any other employee the impression that Jackson either possessed such authority or spoke for management in connection with labor relations.[10] In this latter regard Respondent apparently made no effort to introduce Jackson or any of the other visiting "supervisors" to the rank-and-file employees. Any introduction of Jackson to Drake was handled by either Hennesey or Jackson himself. Accordingly, in these circumstances I recommend that the complaint allegations alleging that Respondent, through its supervisor and agent Jackson, unlawfully coerced employees should be dismissed.

CONCLUSIONS OF LAW

1. Respondent ARA Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 515 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent ARA Services, Inc. did not violate the Act as alleged in the complaint as amended at the trial.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed in its entirety.

[9] *Faulkner Hospital*, 259 NLRB 364, 369 (1981).

[10] *University Townhouses Cooperative*, 260 NLRB 1381, 1388 (1982); *Air Express International*, 245 NLRB 478, 492–493 (1979).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.